Supreme Court, U.S.
FILED
NOV 24 1980

No. 80-251

In the Supreme Court of the United States

OCTOBER TERM, 1980

BERNARD ROSTKER, DIRECTOR OF SELECTIVE SERVICE,
APPELLANT

v.

ROBERT L. GOLDBERG, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REPLY MEMORANDUM FOR APPELLANT

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

WILLIAM KANTER
MARK H. GALLANT
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Cases: Page

Allied Stores of Ohio, Inc. v. *Bowers*, 358 U.S. 522 2
Bertelsen v. *Cooney*, 213 F.2d 275, cert. denied, 348 U.S. 856 8
Brown v. *Glines*, 444 U.S. 348 8
Craig v. *Boren*, 429 U.S. 190 8
Dandridge v. *Williams*, 397 U.S. 471 2
Geduldig v. *Aiello*, 417 U.S. 484 9
Gilligan v. *Morgan*, 413 U.S. 1 8
McLaughlin v. *Florida*, 379 U.S. 184 2
Nixon v. *Herndon*, 273 U.S. 536 8
Orloff v. *Willoughby*, 345 U.S. 83 8
Schlesinger v. *Ballard*, 419 U.S. 498 9
United States v. *MacIntosh*, 283 U.S. 605 8

Miscellaneous:

Department of Defense Authorization for Appropriations for Fiscal Year 1981: Hearings on S. 2294 Before the Senate Comm. on Armed Services, 96th Cong., 2d Sess. (1980) 3, 4
Military Manpower Strength Assessment, Recruiting and Reenlistment Results for Fiscal Year 1980 (Oct. 31, 1980) 5
Presidential Recommendations for Selective Service Reform: A Report to Congress Prepared Pursuant to P.L. 96-107 (Feb. 11, 1980) 9
Reinstitution of Procedures for Registration Under the Military Selective Service Act: Hearings on S. 109 and S. 226 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services, 96th Cong., 1st Sess. (1979) 3, 5, 6, 7, 10
S. Rep. No. 96-826, 96th Cong., 2d Sess. (1980) 2, 3

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-251

BERNARD ROSTKER, DIRECTOR OF SELECTIVE SERVICE, APPELLANT

v.

ROBERT L. GOLDBERG, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

REPLY MEMORANDUM FOR APPELLANT

The question presented is whether the gender-restricted registration enacted by Congress passes constitutional muster, in light of the paramount importance of the governmental interest—preparedness to respond to a national emergency—and the appropriateness of the statutory classification to further that end by supplying combat-capable inductees to meet military personnel needs in such a situation. Appellees cloud the issue by losing sight of the specific purpose served by draft registration, by erroneous factual assertions, and by a wholly inappropriate

reassessment of what personnel the armed services can and should make use of in the event of a national emergency.

1. Appellees argue that women have been shown to handle necessary and important responsibilities in the volunteer forces generally. They reason, from that proposition, that supplying the military with more women—in addition to male conscriptees—could only enhance, rather than hinder, defense flexibility. But these arguments ignore the particular purpose met by the draft registration provisions of the Military Selective Service Act, and lose sight of the principle that the reasonableness of a classification drawn by a statute must be considered in light of the purpose of that statute. *McLaughlin* v. *Florida*, 379 U.S. 184, 191 (1964).

Like the district court, appellees consider registration in a vacuum.[1] The fact is, however, that Con-

---

[1] Appellees contend that the constitutionality of the male-only registration must stand or fall solely on the basis of the reasons articulated by Congress when it enacted the Military Selective Service Act in its "modern form" in 1948, and they argue that the reasons and conclusions expressed in the Report of the Senate Armed Services Committee in 1980) S. Rep. No. 96-826, 96th Cong., 2d Sess. 154-164 (1980)), must be dismissed as afterthought which played no actual part in enactment of the exclusionary registration (Motion to Affirm 4, 36-37). This reasoning is unpersuasive. First, the classification at issue is properly judged under the "rational relationship" test, and may thus be sustained on the basis of any set of factors that might reasonably have been conceived by Congress in its support. See *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970); *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 528 (1979). At all events, the policies and findings articulated by the Armed Services Committee were not offered merely as a rationalization for what Congress did in 1948. Rather, they were issued as part of a comprehensive reexamination of the draft and registration questions in

gress tied the question of who should be registered to the question of who might ultimately be inducted because the sole function of a premobilization registration is to establish a mechanism "for early delivery of inductees in an emergency." S. Rep. No. 96-826, 96th Cong., 2d Sess. 156 (1980).[2] In outlining the basis for its decision to exclude women, the Senate Armed Services Committee emphasized that the purpose of a draft is to supplement the volunteer forces with "combat manpower" in the event of an emergency, that is "the primary need [would be] for combat replacements from the induction system." S. Rep. No. 96-826, *supra*, at 154, 158.[3] At present, women

---

view of current military needs, and followed lengthy hearings on the President's proposal to amend the Act and expand draft registration. These findings culminated in the current defense appropriations bill, H.R. 6974, which rejected the President's proposal and which limited appropriations to the amount necessary to register males. It thus essentially constitutes reconsideration and reenactment of the gender-restricted draft registration.

[2] See *Department of Defense Authorization for Appropriations for Fiscal Year 1981: Hearings on S. 2294 Before the Senate Comm. on Armed Services*, 96th Cong., 2d Sess. 1670 (comments of Assistant Secretary of Defense Danzig) ("The purpose of registration is to equip us with information so that if we had a national mobilization, we could move more quickly to achieve our wartime personnel requirements * * *"), 1674 (comments of Sen. Warner) (those registered should be those who would, if necessary, be drafted) (1980); Statements in Deposition of Bernard D. Rostker, Director, Selective Service (R. 1359, 1400).

[3] See, *e.g.*, *Reinstitution of Procedures for Registration Under the Military Selective Service Act: Hearings on S. 109 and S. 226 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services*, 96th Cong., 1st Sess. 24, 54 (statements of General Rogers), 56 (statement of Sen.

are prohibited by statute and military policy from engaging in combat—a prohibition not challenged here —and Congress simply concluded that including women in the draft pool would not advance the purpose behind registration.

In excluding women in view of the combat restrictions, Congress acted on the eminently reasonable assumption that it was unnecessary to amend a statute intended solely to fulfill emergency military needs in a manner that would not serve those needs. Appellees counter by suggesting that the Senate Committee fabricated its findings as to military requirements, and they assert that the record before Congress uniformly established a military need to induct women. Motion to Affirm 9-12, 44-45. This ignores the testimony of the non-civilian component of the Defense establishment, the members of the Joint Chiefs of Staff. The burden of that testimony was that, although a certain number of female inductees could be accommodated to satisfy concerns of equity,[4] the drafting of females in place of males would, at best, fail positively to serve emergency defense needs and, at worst, hinder military effectiveness by impairing flexibility. General Rogers, Chief of Staff of the Army—the Service which would receive the greatest influx of those called in a draft—was "not prepared to agree that they [women] should be drafted

---

Cohen) (1979); *Hearings on S. 2294, supra,* at 1688 (statement of Sen. Jepsen) ("[T]he shortage would be in the combat arms. That is why you have drafts").

[4] Even under the most favorable statistics appellees can find, the Armed Services could not absorb more than 80,000 women out of a theoretical pool of 650,000 inductees (the total number called for under the model emergency scenario used by the Armed Services in formulating its registration projection).

as of today" given the Army's consistent success at "filling our recruiting objectives for female soldiers." *Hearings on S. 109 and S. 226, supra,* at 14. That view was echoed by the other service chiefs as well. See, *e.g., id.* at 15 (statement of Admiral Hayworth).[5]

Appellees alternatively challenge the Senate Committee's findings by asserting "[t]here is no reason to believe" that the military would not need to induct women "in time of war" (Motion to Affirm 12). But the testimony of the Chiefs of Staff was based pre-

---

[5] Attempting to rewrite the book on military need, appellees assert that "[a]ctually * * * the Army was experiencing a twenty-five percent shortfall in female recruitment in fiscal year 1979" (Motion to Affirm 10 n.17). Appellees' proffer—focusing on testimony offered before the close of the fiscal year—is misleading. It contradicts the general thrust of the testimony concerning the abundance of female volunteers, and ignores current Pentagon statistics, which showed that every service but the Army fully met or exceeded female recruitment needs in fiscal 1980, and that the Army met 95% of its quota. *Military Manpower Strength Assessment, Recruiting and Reenlistment Results for Fiscal Year 1980* (Oct. 31, 1980). General Allen, Chief of the Air Force, advised the Senate Subcommittee that an increase in females compared with males was predicted for the recruitment market. *Hearings on S. 109 and S. 226, supra,* at 48. See also *id.* at 45 (statement of Navy Chief of Staff Admiral Hayward) ("We cannot absorb more women any faster than we are absorbing them * * *"). Appellees also suggest a critical need for combat-barred support personnel. Even putting aside the military's need to reach into non-combat units for personnel rotation purposes, it is worth noting Marine Corps Chief of Staff, General Wilson's testimony in this regard: "[F]rom a combat point of view, the use of women is now against the law. But combat is a relative thing. I have defined combat in such a way that women will not be assigned closer to the front than the division or wing headquarters." *Id.* at 15.

cisely on draft needs projected for "time of war." As Admiral Hayward put it: "To sum up, there would not be a requirement for women to be drafted at all to meet our wartime needs, in my judgment. I think the volunteers would take care of it." *Hearings on S. 109 and S. 226, supra,* at 15. See *id.* at 56 (statement of Sen. Cohen), 72 (statement of Admiral Hayward). See also note 5, *supra.*

Appellees direct their factual rebuttal principally at the Senate Subcommittee's rationale that registering women would impair military flexibility, and they strenuously assert that an expansion of the registration pool can only enhance military flexibility. Here, again, they reject the congressional determination that the sole purpose of registration is to facilitate induction. Significantly, to the extent appellees do recognize that registration is a mechanism for induction, they refuse to evaluate the concept of military flexibility within the relevant context of an emergency draft. As General Rogers explained (*Hearings on S. 109 and S. 226, supra,* at 16):

> One thing which is often lost sight of, Senator [Nunn], is that in an emergency during war, the Army has often had to reach back into the support base, into the supporting elements in the operating base, and pull forward soldiers to fill the ranks * * *.
>
> * * * * *
>
> Now, if that support base and that operating base to the rear consist in large measure of women, then we do not have that opportunity * * *.

Thus, while "women plus men" might appear to enhance flexibility on an abstract registration roll, the substitution of women for men within a finite pool of inductees subject to emergency deployment has the opposite result.

Similarly, appellees would apparently write off any delays stemming from the armed services' inability to deploy 100% of the finite number of inducted trainees to combat zones. But, while the avoidance of such delay might be viewed as a constitutionally insubstantial matter of administrative convenience in another context, it is compelling when the concern is to assure a prompt military response to national emergency. As Admiral Hayward explained (*Hearings on S. 109 and S. 226, supra*, at 72):

> The national strategy for conventional conflict is heavily dependent on mobilization and deployment rates.
>
> Timeliness of mobilization and deployment, and our ability to sustain the flow of manpower and material to the theater of conflict, are factors critical to the success of the strategy.
>
> Any liability of the Selective Service System to ensure the timely flow of forces to the war places the outcome of our strategy in serious question, and our national security in jeopardy.

Finally, the loss of flexibility that could stem from devoting limited training facilities to non-combat capable female inductees could also have a critical impact in time of war. In this regard, General Wilson advised the Committee that the Marine Corps' war efforts would be more constrained by limitations in "training capacity" than by personnel shortages. *Id.* at 73. General Rogers similarly explained that "[i]t is necessary to plan to keep the military training establishments filled to capacity in any situation requiring full mobilization." *Ibid.*

In sum, the only purpose of registration is to permit a speedy and efficient draft. The military needs served by, and the military flexibility derived from, a registration pool must therefore be evaluated

strictly in light of the roles that registrants would be called to serve as emergency inductees. Congress deemed it inadvisable to provide for the induction of women because of the failure of such a draft to further the military's overriding need for combat-capable personnel, combined with the potential harm that could ensue from complicating the induction system to accommodate equity rather than strict military necessity. This approach was not only rational, but closely fitted to the purpose of the Act.

2. The foregoing discussion not only establishes that the gender distinction drawn by the Military Selective Service Act survives heightened scrutiny under the test of *Craig* v. *Boren*, 429 U.S. 190 (1976); it also serves to illustrate the impropriety of applying that test to the extent that it does involve a substantive evaluation of military personnel needs. It is a hazardous enterprise for the courts to re-evaluate decision-making by a coordinate branch in this area. *United States* v. *MacIntosh*, 283 U.S. 605, 622 (1931). See *Brown* v. *Glines*, 444 U.S. 348, 360 (1980); *Gilligan* v. *Morgan*, 413 U.S. 1, 8 (1973); *Orloff* v. *Willoughby*, 345 U.S. 83, 91-92 (1953); *Bertelsen* v. *Cooney*, 213 F. 2d 275, 277 (5th Cir.), cert. denied, 348 U.S. 856 (1954). Appellees would disregard the precedents requiring deferential review of military and defense-related actions almost entirely on the ground that "registration * * * is imposed only on civilians" (Motion to Affirm 32-33). This response is of a kind with the argument that voting discrimination presents only a "political question," and it merits the same short treatment as "little more than a play upon words." *Nixon* v. *Herndon*, 273 U.S. 536, 540 (1927).

What is more, the "rational basis" standard is appropriate in the present context because men and

women are not "similarly situated" in view of the combat restrictions. *Schlesinger* v. *Ballard*, 419 U.S. 498, 508 (1975). The statutory classification is not a derivative of gender *per se*, but rather neutrally excludes persons presently ineligible for combat duty.[6] Cf. *Geduldig* v. *Aiello*, 417 U.S. 484 (1974) (exclusion of pregnancy benefits from state disability system is not based on gender *per se*, but on the condition of pregnancy, and is reviewed under a rational relationship test). The combat exclusion itself is not claimed by appellees to be based on false stereotypes, nor is it immutable. If and when combat restrictions are removed, an amendment in the registration provisions of the Act can follow. In the meanwhile,

---

[6] Appellees argue that all men, however unfit, but no women "however fit to serve, are compelled to register for potential conscription into the Armed Forces" (Motion to Affirm 19, 46). But, of course, those men who are ineligible for combat assignment—including not only the "halt" and the "blind," but the flatfooted as well—ultimately are stricken from the induction rolls through the classification process. All persons ineligible for combat—male and female—are thus equally excused from "conscription into the Armed Forces." *Id.* at 19. Ideally, one would excuse all those unfit for combat from registration as well. But that is not practical. Classification has been deferred until after the issuance of induction notices because, at least in some cases, the physical and mental conditions of registrants are subject to change, and the evidence demonstrated that it is most efficient to presume all males combat-capable until classification. See *Presidential Recommendations for Selective Service Reform: A Report to Congress Prepared Pursuant to P.L. 96-107* (Feb. 11, 1980) (R. 216-218). On the other hand, since every woman is precluded by law and policy from combat assignment, it would have made no sense for Congress to require women's registration in the first place.

"as long as the military Services are permitted to continue to take volunteers after a declared M[mobilization]-day, no man or woman would be denied the opportunity to serve their country." *Hearings on S. 109 and S. 226, supra*, at 16 (statement of General Allen).

For the reasons stated here and in our jurisdictional statement, probable jurisdiction should be noted, or the judgment below should be summarily reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

WILLIAM KANTER
MARK H. GALLANT
Attorneys

NOVEMBER 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 333335 154